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RENE BERLINGER

**UNITED STATES DISTRICT COURT
DISTRICT OF CALIFORNIA**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

JAMMIN' JAVA CORP., dba
MARLEY COFFEE, SHANE G.
WHITTLE, WAYNE S. P. WEAVER,
MICHAEL K. SUN, RENE
BERLINGER, STEPHEN B.
WHEATLEY, KEVIN P. MILLER,
MOHAMMED A. AL-BARWANI,
ALEXANDER J. HUNTER, and
THOMAS E. HUNTER,

Defendants.

Case No.: 2:15-cv-08921 SVW (MRWx)

**SPECIALLY APPEARING
DEFENDANT RENE BERLINGER'S
MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR
ORDER AUTHORIZING SERVICE
BY ALTERNATIVE MEANS UNDER
FED. R. CIV. P. 4(f)(3)**

Date: April 25, 2016
Time: 1:30 p.m.
Ctrm.: 6

1 The motion of the Securities and Exchange Commission (SEC) for service
 2 by alternative means on Specially Appearing Defendant Berlinger, a Swiss citizen
 3 residing in Trimbach, Switzerland, should be denied because it 1) fails to respect
 4 the sovereign interests of the Swiss Government requiring service of process under
 5 the Hague Convention; 2) attempts to circumvent the laws of Switzerland and the
 6 Convention, which establish a process that is neither difficult nor lengthy for
 7 service in Switzerland; and 3) effectively concedes that the SEC has made *no*
 8 *attempt*, since filing a complaint in November 2015, to properly serve a defendant
 9 the SEC has always acknowledged is a citizen and resident of Switzerland. This
 10 Court should not reward the SEC's evident lack of effort to serve Mr. Berlinger,
 11 condone the SEC's disregard for Federal Rule of Civil Procedure (hereinafter
 12 "FRCP") 4(f)(3), or set a bad precedent that our government can, through lack of
 13 effort, avoid basic obligations under well-recognized laws and treaties. For all the
 14 foregoing reasons, and as elaborated below, this Court should deny the SEC's
 15 motion.

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 21 **THE SEC FALLS WELL SHORT OF ESTABLISHING**
 22 **THE NEED FOR SERVICE BY ALTERNATIVE MEANS**

23 The 1965 Convention on the Service Abroad of Judicial and Extrajudicial
 24 Documents in Civil or Commercial Matters (Hague Convention) provides at
 25 Article 1 that it "shall apply in all cases, in civil or commercial matters, where
 26 there is occasion to transmit a judicial or extrajudicial document for service
 27 abroad." 20 U.S.T. 361, entry into force Feb, 10, 1969 (emphasis added). By
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1 virtue of the Supremacy Clause of the U.S. Constitution the Hague Convention
2 precludes inconsistent methods of service prescribed by state law in all cases to
3 which it applies. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694,
4 699 (1988).
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6 The SEC shows neither a failed attempt to serve Rene Berlinger nor any
7 facts that remotely resemble undue hardship. If Hague Convention service is
8 attempted and has failed, or if an entity can establish some other undue hardship,
9 alternative service may be appropriate. However, the SEC cites no evidence and
10 attaches no document that shows it made any attempt to properly serve Mr.
11 Berlinger. The SEC also fails to cite anything that justifies circumventing a treaty
12 that the Swiss government expects to be followed in the interest of providing basic
13 protections for its citizens. As an illustrative example, the SEC cites no evidence it
14 even secured a translation of the Complaint into Mr. Berlinger's native language of
15 German, one of the basic requirements of Hague Convention service. While FRCP
16 4(f)(3) may be a relief mechanism for difficult circumstances, it was never
17 intended to justify service under the circumstances described in the SEC's motion
18 as it relates to Mr. Berlinger.
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20 The Advisory Committee notes to FRCP 4(f) make it clear that the Hague
21 Convention should be followed if possible. They expressly confirm that Article 15
22 of the Convention provides that "alternate methods may be used if a Central
23 Authority does not respond within six months. Generally, a Central Authority can
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1 be expected to respond much more quickly.” Notably, Article 15 “furnishes
2 safeguards against the abridgement of rights of parties through inadequate notice.
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4 Article 15 of the Convention provides for verification of actual notice or a
5 demonstration that process was served by a method prescribed by the internal laws
6 of the foreign state.” These Advisory Committee notes make clear that the Hague
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8 Convention must be followed in the first instance; here, the SEC’s motion attempts
9 to twist a method of last resort into a method of *first resort*, which is contrary to
10 the basic purpose of the rule.
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12 Indeed, the SEC’s statement that service on Mr. Berlinger under the
13 Convention is “in every practical sense – unavailable” is both unsupported and
14 demonstrably false. The SEC does not deny that Switzerland is a signatory to the
15 Hague Convention. In the interest of protecting its citizens, Switzerland has
16 established some basic protections; it does not allow service by mail or electronic
17 mail from the United States and requires service of documents in German if its
18 citizen speaks German. Nothing in the SEC’s motion suggests that it made any
19 attempt at serving Mr. Berlinger, thus the SEC has provided this Court with no
20 evidence that serving Mr. Berlinger was, in fact, unavailable or impractical.
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24 Publicly-available guidance from the Swiss Federal Office of Justice further
25 demonstrates the weakness and lack of substance behind the SEC’s claim that
26 service on Mr. Berlinger is impractical or not available. The Swiss government
27 publishes a guide regarding service by foreign authorities
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1 (<http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf>),
2 and the U.S. State Department provides guidance on service of process on Swiss
3 nationals. (http://bern.usembassy.gov/service_process.html). Neither resource
4 establishes the supposed difficulty or impracticability claimed by the SEC.
5 Instead, the guidance supplied by the State Department notifies parties that “[t]he
6 U.S. Embassy at Bern advises that the length of time required to effect service by
7 the Government of Switzerland varies by case and canton, but will generally go
8 fairly quickly.” (emphasis added). The SEC’s motion and the few attachments that
9 concern Mr. Berlinger do not show the SEC made any effort to serve him since the
10 Complaint was filed over four months ago, or why the SEC failed to follow the
11 roadmap published by the Swiss government.
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16 The State Department resources referenced above contain the following
17 relevant text regarding service in Switzerland. They describe a process that is
18 neither difficult nor particularly time-consuming:
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20 In Switzerland, documents may only be served through the
21 appropriate Swiss Central Authority under the Hague Convention on
22 the Service Abroad of Judicial and Extrajudicial Documents in Civil
23 and Commercial Matters (20 UST 361; TIAS 6638) , to which the
24 U.S. is a signatory, or by means of letters rogatory. The Swiss penal
25 Code 271 provides that attorneys attempting to serve process are
26 subject to arrest on criminal charges.

27 ... Switzerland, in a reservation to its accession to the Convention,
28 declared that in cases where the addressee does not voluntarily accept
a document, it cannot officially be served on him or her in accordance
with Article 5, first paragraph, unless it is in the language of the
authority addressed, i.e. in German, French or Italian, or accompanied

1 by a translation into one of these languages, depending on the part of
2 Switzerland in which the document is to be served.

3 ... Article 10 - Service By Mail or by Judicial Officer in Requested
4 Foreign State:

5 On ratification, Switzerland declared that it objects to the use of the
6 methods of service referred to in Article 10, including service by
7 postal channels. As a general rule, the U.S. favors the use of service
8 through the Convention Central Authority in other countries party to
9 it. If service of process by registered mail is effected in a country like
10 Switzerland which may not consider such service valid, enforcement
11 of a U.S. judgment in that or a third country may be difficult.

12 U.S. State Dep't, Embassy at Bern, Service of Process, [http://bern.usembassy.gov/](http://bern.usembassy.gov/service_process.html)
13 [service_process.html](http://bern.usembassy.gov/service_process.html) (last visited Apr. 4, 2016).

14 Although service upon a Swiss resident requires more than placing an
15 envelope in the mail, the requirements are hardly daunting. In summary: 1) Only
16 Swiss authorities may serve process; 2) Documents must be officially translated
17 into the appropriate language, which is German in Mr. Berlinger's case; and 3)
18 Switzerland specifically objects to service by mail and requires a process that
19 involves its own court system. None of these basic protections are difficult to
20 understand or impractical to follow.

21 The SEC's only seemingly legitimate support, from an unpublished court
22 decision in the Western District of Kentucky, does not address service of a
23 complaint in a civil lawsuit. In that case, the SEC had already obtained a judgment
24 and sought to serve individuals who resided in Switzerland but owned real
25 property in the relevant Federal District, for purposes of collecting on that
26 judgment. *SEC v. Craven*, 2015 WL 9275741, *1 (W.D. Ken. Dec. 18, 2015). The
27 court further noted that personal service "could take up to two months" and that
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1 Swiss authorities might still refuse service of that matter, an effort to collect a
2 judgment, that “could be construed as not being a civil or commercial matter.” *Id.*
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4 The matter before the Court here is the initiation of a civil lawsuit, not an effort to
5 foreclose on property to satisfy a judgment. The SEC’s motion lacks any factual
6 basis for concluding that the service of a civil complaint will encounter any
7 difficulty in Switzerland. Indeed, as the Court in *Craven* noted, service on a Swiss
8 resident is not only possible, but also could have been completed relatively quickly
9 had the SEC made the attempt in this case.
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12 The Hague Convention has been held to have the status of a treaty, and is
13 therefore constitutionally the “supreme law of the land” that must be followed by
14 this Court. *E.g., Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 882
15 (Ala. 1983); *Dr.Ing. H.C.F. Prosche A.G. v. Superior Court*, 123 Cal. App. 3d 755,
16 757-58, 177 Cal. Rptr. 15156 n.1 (1981). Twisting FRCP 4(f) into a method of
17 service of first resort, rather than simply asking the SEC to follow basic protocols
18 and effect service, set a bad precedent and would likely encourage other federal
19 courts to ignore the basic legal protections embodied by the Hague Convention to
20 which the U.S. and 70 other nations are party. Worse, Swiss courts could feel
21 emboldened to disregard basic protections in U.S. laws and international treaties
22 without good cause. The S.E.C. has available the full resources of the U.S.
23 government to effectuate service properly. Our government has a special
24 responsibility to adhere to an international convention. Because the SEC has failed
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1 to show that service on Rene Berlinger has been attempted and delayed or denied,
2 and has further failed to show that proper service is either difficult or impractical,
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4 its motion must be denied.

5 DATED: April 4, 2016

Respectfully submitted,

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9 By: _____/s/
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